United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1401, 76-1407

To be argued by
DAVID J. GOTTLIEB

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

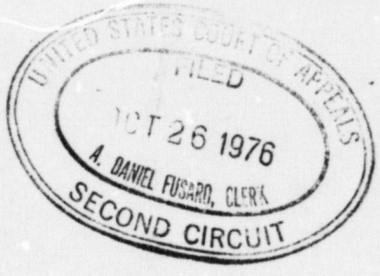
ALAN MICHAEL FITZGERALD and
ERIC STANCHICH,

Defendants-Appellants.

Docket No. 76-1401
Docket No. 76-1407

BRIEF FOR APPELLANT
ERIC STANCHICH

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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CONTENTS

TABLE OF CASES

STATUTES AND RULES CITED

UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT ERIC STANCHICH

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether having properly found that appellant Stanchich's participation in a conspiracy was not established by a fair preponderance of the non-hearsay evidence, the trial court committed fundamental error by then permitting co-defendant Fitzgerald's hearsay evidence to be considered by the jury as proof of Stanchich's guilt of the substantive counts.

2. Whether with or without the hearsay evidence there was sufficient proof to establish appellant Stanchich's guilt of aiding and abetting.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Pierce, J.) entered September 7, 1976, convicting appellant Eric Stanchich of fraudulently attempting to sell and possessing a counterfeit Treasury bill (18 U.S.C. §§2, 472) and knowingly transferring a counterfeit Treasury bill with the intent that the bill be passed as genuine (18 U.S.C. §§2, 473). Appellant Stanchich was sentenced to three years' imprisonment on both counts, the terms to run concurrently, with appellant being eligible for parole pursuant to 18 U.S.C. §4205(b)(2).

This Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel for Mr. Stanchich on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Indictment 75 Cr. 1162[1] charged appellant Eric Stanchich and co-defendant Alan Fitzgerald with conspiring, from November 10, 1975, to December 2, 1975, the date of the indictment, to possess and transfer a counterfeit Treasury note. The two

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[1]The indictment is B to the separate appendix to appellant's brief.

defendants were also charged with substantive violations of 18 U.S.C. §§472 and 473. The Government's theory was that Fitzgerald negotiated the transfer of a counterfeit Treasury bill to one Francis McDonnell, a person who was, in fact, an agent of the U.S. Treasury Department. Fitzgerald was introduced to the agent by an acquaintance and paid informer for the Government, Alan Lurie. Appellant Stanchich did not participate in any of the meetings between Fitzgerald and Lurie or the Treasury agent. The Government's theory, accordingly, was that appellant Stanchich aided and abetted the venture by staying "in the background, observing everything, checking out the buyers, making sure everything was all right" (9[2]). Following a three-day trial, the court granted the defense motion for a judgment of acquittal on the conspiracy count, but allowed the substantive counts as against both defendants to go the jury. Following summations and the court's charge, the jury convicted appellant Stanchich and co-defendant Fitzgerald of both substantive counts.

The Trial Evidence

Alan Lurie testified to the origin of an agreement to

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[2]Numerals in parentheses refer to pages of the transcript of the trial.

transfer a counterfeit U.S. Treasury note.[3] Lurie testified that he had met appellant Stanchich first during 1970 or 1971 and co-defendant Fitzgerald in 1973 (13-15).

In May, 1974, following his release from prison on parole from a conviction for interstate transportation of stolen securities, Lurie began working for Sportswear Digest, an ultimately unsuccessful financial enterprise. Lurie testified that during his employment with the Digest, he met with appellant Stanchich at the office of one Jack Arnold and that during the meeting appellant Stanchich offered to supply Lurie with counterfeit Treasury bills. (The above evidence was admitted as proof of a "prior similar act" against appellant Stanchich) (17-20).

Lurie also became associated with a company called Nassau Film Studios. During his employment there, in March 1975, he met with co-defendant Fitzgerald and requested his assistance in financing a film project. Lurie testified that Fitzgerald contacted "his people" and that they were willing to put up Treasury bills as collateral Lurie could use for a period of

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[3]Lurie was convicted of interstate transportation of stolen securities in 1972. In May, 1974, he was released on parole. That August, Lurie was found to be in possession of a counterfeit Treasury note. In order to "persuade" the Government of his innocence of any wrongdoing, Lurie decided to cooperate with the Government (12-13, 79, 99). Eventually, Lurie's cooperation resulted in his obtaining financial rewards, as the Government paid him $6,500 to cover his "expenses" (114-115).

time for a rental fee at approximately 20% of the face value of the bills. An associate of Fitzgerald's eventually took the bills to Lurie. Lurie determined that the bills were counterfeit, and he called Fitzgerald to tell him he did not wish to use counterfeit bills. Fitzgerald denied knowledge that the bills were counterfeit, but stated that they were of excellent quality and that Lurie could use them without any trouble. (The above was admitted as "prior similar act" evidence with respect to Fitzgerald) (21-27).[4]

Following these events, Lurie began his cooperation with the Government. Pursuant to his agreement with the Government, on October 28, 1975, Lurie placed a telephone call to the co-defendant, Fitzgerald.[5] Lurie told Fitzgerald that something "nice" had come up and that he'd like to get together with Fitzgerald, appellant Stanchich, and another person about a matter which Lurie had "got a home for" in "very large numbers" but did not want to discuss over the telephone. Co-defendant Fitzgerald stated that appellant Stanchich was in Europe and that he was to return the following day. Lurie suggested that a meeting be held later in the week. Fitzgerald agreed to call

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[4]Lurie also testified that appellant Stanchich had told him he was aware of the above transaction and that "they should never have given me Treasury bills the way they did" (31).

[5]A tape recording of the call was played to the jury and admitted as Government Exhibit #1. A transcription of the conversation was admitted into evidence as Government Exhibit #2 (see 34-40).

Lurie the next day to make arrangements (GX-1, 2[6]). The material relating to appellant Stanchich was received over objection and despite a defense motion to redact the transcript (33-36).

Almost a week later, on November 3, 1975, Fitzgerald returned Lurie's call. He told Lurie that he had not spoken to Stanchich but that he had contacted "his people" and that they would have a "sample" available the next day (50). At the meeting the following day, Fitzgerald handed Lurie an envelope containing a $100,000 Treasury note. Lurie requested an opportunity to examine the bill. Fitzgerald said he would have to contact his associates for permission to give it to Lurie. The pair met again at 11:30 a.m. Fitzgerald stated that he had obtained permission to lend the bill for a couple of hours and that he wished to sell the bill for 20% of its face value (53-54). Lurie took the bill, gave it to a Secret Service agent, and was provided with a different counterfeit bill. He also arranged to meet Fitzgerald at 6:30 that evening at the Cattleman's Restaurant located on 45th Street between Madison and Fifth Avenues (56-57). Lurie went to the meeting in the company of a person who he believed to be a banker named "Frank," but who was, in fact, Francis McDonnell, a Treasury agent (58, 125). Lurie had McDonnell wait at a corner of the bar and approached

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[6]Numerals in parentheses preceded by "GX" refer to the numbers of Government exhibits introduced at trial.

co-defendant Fitzgerald (59). Lurie told Fitzgerald that there was a misspelling on the bill and that his friends were furious at the mistake. The two then went downstairs to the washroom, where Lurie introduced co-defendant Fitzgerald to McDonnell. Fitzgerald apologized for the mistake, saying that he could not understand it because the bill was a copy of an original bill and that in all his years in dealing with counterfeit notes he had never seen a copy misspelled (59-61, 128-130). Fitzgerald agreed to correct the copy of the bill. McDonnell then informed Fitzgerald that he was a bank officer in the Wall Street area, that he had the ability to approve large loans, and that he had dealt with Lurie on a number of occasions.

Fitzgerald offered several millions of dollars worth of notes to McDonnell. McDonnell requested three million dollars worth of notes, which he could pledge as collateral against a loan on a manufacturing company. McDonnell said he could hide the counterfeit nature of the securities by transferring them with securities from an estate trust account. Fitzgerald's proceeds of the transfer were to be 25 points, with an immediate cash payment of $300,000. Fitzgerald agreed to the deal, and said he would have the notes ready in a week (72, 131-133).

Fitzgerald's next contact with Lurie was on November 10, 1975, the initial date of the conspiracy charged in the indictment. Fitzgerald stated that he had corrected the counterfeit note and that the entire three million dollars worth of notes was printed, but that they would need $20,000 to $25,000 right

away to cover printing expenses. Lurie accepted the bill and said he would show it to "Frank" (McDonnell). Lurie and Fitzgerald agreed to meet at 1:00 p.m. at the Cattleman Restaurant (74). Following the meeting, Lurie contacted the Secret Service and told them he had the Treasury bill. The agents instructed him not to attend the 1:00 p.m. meeting, and Lurie played no further part in the transactions (74-77).

At approximately 1:30 p.m. McDonnell, who had been given Fitzgerald's corrected Treasury bill (136), met directly with Fitzgerald and turned the bill over to him. Fitzgerald was upset that Lurie was absent, but McDonnell assured him he was an old friend of Lurie's and that he could be trusted. Fitzgerald requested the immediate payment of $25,000 for the $100,000 note before completing the deal. McDonnell demurred, stating that he would have to complete the entire three million dollar transaction at one time. Fitzgerald said "his people" would be upset that he hadn't obtained $25,000 in advance. Fitzgerald stated he would try to complete the transaction at one time, as McDonnell wished, but that he didn't know if it would be possible. The pair agreed to meet that night at the Cattleman Restaurant (137-140).

The meeting took place as scheduled. McDonnell entered the bar and proceeded to a table where Fitzgerald was sitting. The parties repeated their positions of earlier that day: Fitzgerald wanted to transfer the $100,000 note at once; McDonnell argued that the entire $3,000,000 deal should take

place at one time. Fitzgerald agreed once more to go back to "his people," but said he doubted that they would agree to the deal without some assurance that they would immediately receive their $25,000 (140-143). McDonnell told Fitzgerald to call him two days later to see if the deal could be finalized. McDonnell left the restaurant and observed someone following him (144-146).

According to the testimony of two surveillance agents, as McDonnell walked along 45th Street, another man, one Vincent Napoli, who had been standing in front of the restaurant, began to follow him. As McDonnell reached the corner of 45th Street and Madison Avenue, Napoli crossed to the other side of the street and met with another man, identified as appellant Stanchich. Both men then walked on opposite sides of the street, behind McDonnell, up to 45th Street and Vanderbilt Avenue. At that point, the surveillance agents lost sight of McDonnell. Stanchich and Napoli looked up Vanderbilt Avenue and then continued walking East on 45th Street. At 45th Street and Park Avenue, the two men spoke; Napoli turned north toward Park Avenue; appellant Stanchich continued along 45th Street. Eventually, the two men were seen back together at 45th Street and Madison Avenue (188-193, 287-291).

On November 12, 1975, the date of the transfer of the Treasury bill, Fitzgerald left his hotel at 61st Street and proceeded to the Market Diner at 43rd Street and Eleventh Avenue for breakfast with Vincent Napoli and appellant Stanchich.

At approximately 9:15 a.m., Fitzgerald left Stanchich and Napoli outside the diner, proceeded to a telephone booth, and called McDonnell (147, 167-172, 194-195, 236-238, 255). Fitzgerald said he was having difficulty with the deal. McDonnell suggested that they meet at the Compass Bar and Restaurant in lower Manhattan at 11:00 o'clock that morning (147). Fitzgerald and Napoli then got into a car driven by appellant Stanchich, and the three men proceeded to lower Manhattan, eventually parking the car in a public garage on Stone Street (174-175, 195-198, 238-239, 255)

McDonnell and Fitzgerald met as scheduled in the Compass Bar at 11:00 a.m. (147). Again, Fitzgerald said "his people" were upset over not receiving $25,000 in advance and that the $3,000,000 package could not be completed without it. Again, McDonnell attempted to convince Fitzgerald that the deal would have to be completed at one time (148). Again, McDonnell said he would see what he could do, and asked Fitzgerald to call him. As McDonnell left the restaurant, he saw appellant Stanchich in the lobby (149-150). Stanchich and Vincent Napoli were also seen sitting at a booth in the restaurant, two booths away from McDonnell and Fitzgerald (256-257).

Shortly after Fitzgerald's departure, appellant Stanchich and Napoli left the restaurant. They proceeded to the lobby of an office building, Number Two Broadway, where they were observed conversing with Fitzgerald (241, 261-262).

That afternoon, Fitzgerald called McDonnell and once again

stated that "he had to do the $100,000 bill first" (150). McDonnell agreed to the plan and set up a meeting that afternoon for 2:00 p.m. at the Blarney Stone Bar in lower Manhattan (150). At 2:00 p.m., Fitzgerald and McDonnell met on the sidewalk outside the bar. Fitzgerald took a brown, sealed envelope from his pocket. The pair entered the bar and sat down. McDonnell opened the envelope and ascertained that it contained the $100,000 bill.[7]

McDonnell told Fitzgerald he had seen appellant Stanchich that morning, that he knew he was involved with Lurie, and inquired what he was doing there. Fitzgerald said it was "his end of the deal," and that McDonnell should not ask him a lot of questions (153). McDonnell stated that he did not want a lot of people to know who he was. Fitzgerald replied that it was his end of the deal, that McDonnell should stay out of it, and that "I'll get rid of him before you get back" with the money (154). McDonnell then stated that he knew there was a third man and that he didn't want him to know who he was. Fitzgerald replied that he would get rid of "both of them." Finally, McDonnell asked whether he could meet the two men. Fitzgerald refused, stating that he couldn't bring them inside.

This discussion was admitted in the court below "subject to connection" and over appellant Stanchich's objection (152-154).

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[7]It was stipulated that a Government witness would testify that the bill, GX-4, was counterfeit.

Following this discussion, McDonnell lit a cigar which, pursuant to a pre-arranged plan, resulted in Fitzgerald's arrest (155). Shortly thereafter, appellant Stanchich was arrested while he was leaving his automobile near the bar in lower Manhattan (200-201).

Following presentation of the Government's case, appellant Stanchich moved for a judgment of acquittal on all three counts. Before deciding the sufficiency question, the court proceeded to consider whether the Government had produced sufficient evidence, apart from Fitzgerald's hearsay statements, to establish a conspiracy by a preponderance of the evidence, thus permitting the introduction of Fitzgerald's statements against appellant Stanchich. The Government argued that appellant Stanchich's presence with Napoli outside the Cattleman Restaurant on November 10, his presence at the Market Diner, his presence in the Compass Restaurant, his conversation at Number Two Broadway, and his arrest near the Blarney Stone Restaurant established his participation in the conspiracy (316-323). The Government also argued that Fitzgerald's statements to McDonnell in the Blarney Stone Restaurant were verbal acts that could be considered as independent evidence of appellant Stanchich's involvement (323-327).

The court found that Fitzgerald's statements were not verbal acts (328). Following further discussion, the court found the evidence did not establish a conspiracy by a fair preponderance of the evidence. Judge Pierce dismissed the

conspiracy count against both appellant Stanchich and Fitzgerald. However, the court then found that the evidence admitted "subject to connection" only pertained to evidence admitted to prove the conspiracy and that such evidence could therefore go to the jury on Counts Two and Three (333). The court's rationale for permitting, over defense objection, all the "subject to connection" evidence to go to the jury on the substantive counts was as follows:

> The subject to connection aspect is essentially a conspiracy question as I have viewed it, requiring the showing of some independent evidence by a fair preponderance of proof in order for it to be received.
>
> As to the substantive counts I consider it to be received without limitations.

(334).

The defense moved to dismiss Counts Two and Three against appellant Stanchich since "the same law as to mere presence or mere association and the same requi[si]te of knowledge of the specific criminal purpose and desire to want to do something to help bring this about is required under aiding and abetting" (335). The court also denied appellant Stanchich's motions for a judgment of acquittal on Counts Two and Three, stating that there was enough evidence for the jury to find that appellant Stanchich's presence was "other than mere presence" and that the jury could consider whether his interests were with knowledge that there was a criminal venture afoot (336).

In his charge, Judge Pierce made no statements or instruc-

tion of how Fitzgerald's hearsay testimony should be evaluated by the jury. Following deliberations, the jury found both appellant Stanchich and co-defendant Fitzgerald guilty of Counts Two and Three.

ARGUMENT

Point I

THE TRIAL COURT, HAVING PROPERLY FOUND THAT APPELLANT STANCHICH'S PARTICIPATION IN A CONSPIRACY WAS NOT ESTABLISHED BY A FAIR PREPONDERANCE OF THE NON-HEARSAY EVIDENCE, COMMITTED FUNDAMENTAL ERROR BY THEN PERMITTING CO-DEFENDANT FITZGERALD'S HEARSAY EVIDENCE TO BE CONSIDERED BY THE JURY AS PROOF OF STANCHICH'S GUILT OF THE SUBSTANTIVE COUNTS.

Following submission of the Government's case, the trial court proceeded to consider whether there was sufficient independent evidence of appellant Stanchich's association with Fitzgerald to justify admitting against Stanchich Fitzgerald's many hearsay declarations.* Judge Pierce quite properly found that the non-hearsay evidence of Stanchich's association was insufficient to establish a conspiracy or concert of action.[8]

Having so found, the court's obligation was clear: to instruct the jury to disregard the hearsay in evaluating appellant Stanchich's guilt of the substantive counts or, if the hearsay was so large a proportion of the proof as to render such an instruction of doubtful utility, to declare a mistrial. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Instead, however, the court

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[8] The court then proceeded to acquit both defendants on the conspiracy count.

brushed aside defense objections, seemingly of the view that what was inadmissible hearsay for purposes of establishing a conspiracy was somehow admissible on the substantive counts. Since that view was entirely incorrect, the judgment of conviction must be reversed.

Here, there is no doubt that the court found that the non-hearsay evidence failed to show a concert of action between Fitzgerald and Stanchich sufficient to establish the conspiracy charged by a preponderance of the evidence. The record shows that, following presentation of the Government's case, the defense moved for a judgment of acquittal on the conspiracy count, contending that the evidence was insufficient to show appellant Stanchich's or Napoli's participation with knowledge in a conspiracy (317). The court properly deferred its resolution of this issue and instead urged the Government to show "what evidence you assert is in the record which is sufficiently of independent evidence [sic] for me to rule it is connected. Then we will come to [the defense motions]" (318). The Government proceeded to catalogue the "independent proof that the Government had adduced to establish the conspiracy -- that is, independent of Mr. Fitzgerald's statements" (318).[9]

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[9]The Government alleged that appellant Stanchich's presence near the Cattleman Restaurant (318-319), at the Market Diner (319), the Compass Restaurant (320-321), and at Number Two Broadway (321), and his arrest in the Wall Street area demonstrated his participation. The Government also argued that

The Government also argued that even if the independent evidence of appellant Stanchich's involvement was insufficient to establish his membership, there was more than enough evidence to show Fitzgerald's knowing involvement with others (331). The court stated that while there was enough evidence to go to the jury on the substantive counts,

> I grant the motion as to Count 1 with respect to Stanchich and Fitzgerald. The motion to dismiss is granted.
>
> I find, however, that those exhibits which were received subject to connection -- that only pertains to Count 1. Is that agreed, the subject to connection aspect of it only pertains to Count 1.
>
> (333).

When counsel for Stanchich registered his disagreement, the court stated:

> You can only lose at this point, Mr. Schacher. The motion that you made has been granted. The subject to connection aspect is essentially a conspiracy question as I have viewed it requiring the showing of some

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[Footnote continued from the preceding page]

Fitzgerald's statements in the Blarney Stone Bar that he would "get rid of" appellant were verbal acts constituting independent evidence of appellant Stanchich's involvement (324). With respect to this argument, the court stated:

> I am not bogged down with if it is a verbal act. It is admissible to allow the jury to then do what it wishes with respect to it. I am concerned with is it a verbal act. I am not convinced that it is.
>
> (328).

> independent evidence by a fair preponderance of proof in order for it to be received.
>
> As to the substantive counts, I consider it to be received without limitation.
>
> (334). Emphasis supplied.

The above sequence demonstrates that the court found that the independent evidence failed to establish an agency relationship between appellant Stanchich and Fitzgerald. That being the case, Fitzgerald's statements were hearsay, pure and simple, and should never have been received.

It is fundamental that, absent an exception to the hearsay rule, any of Fitzgerald's statements offered as proof of the matter asserted were hearsay as to Stanchich. Rule 801(c), Federal Rules of Evidence. This case involved a welter of such hearsay by appellant Stanchich's co-defendant, including, but not limited to, Fitzgerald's conversation in the Blarney Stone Bar, admitted over objection, in which he indicated that appellant was a co-participant, his constant conversational references to discussions with or approval by "his people," and Fitzgerald's taped telephone conversation with Lurie, also admitted over objection (GX-1, 2; 49-50, 138, 140-143, 148, 153-154). Compare, United States v. D'Amato, 493 F.2d 359, 364 (2d Cir.), cert. denied, 419 U.S. 826 (1974) (declaration that individual is going to meet "his people"). In order for these statements to be admitted against Stanchich, it was necessary for the Government to show that Fitzgerald's statements could be admitted under the rule treating as non-hearsay "a

statement by a coconspirator of a party during the course of and in furtherance of the conspiracy." Rule 801(d)(2)(E), Federal Rules of Evidence. The availability of this exception depends upon a finding by a preponderance of the evidence apart from the alleged hearsay that a conspiracy in fact existed and that Stanchich was a knowing participant in it. This determination is the trial court's to make in the first instance. United States v. Kaplan, 510 F.2d 606 (2d Cir. 1974); United States v. Geaney, supra, 417 F.2d at 1120. In evaluating the facts relating to the admissibility of the hearsay, the trial judge has wide discretion, United States v. Ragland, 375 F.2d 471, 477 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968); United States v. Von Clemm, 136 F.2d 968, 971 (2d Cir.), cert. denied, 320 U.S. 769 (1943), and its ruling is not to be lightly disburbed. United States v. Von Clemm, supra, 136 F.2d at 971; see United States v. Kaplan, supra, 510 F.2d at 612.

On the record in this case, the court's finding that the conspiracy was not established was not only supportable, it was mandated. The independent evidence of appellant Stanchich's involvement in a conspiracy relied on by the Government in essence established only the following:

(1) On the night of November 10, appellant Stanchich and Napoli were in the vicinity of the Cattleman Restaurant and walked along 56th Street at a distance behind McDonnell;

(2) On the date of Fitzgerald's arrest, Stanchich met Fitzgerald for breakfast, following which Fitzgerald placed a telephone call to McDonnell;

(3) Following the breakfast, Stanchich drove Fitzgerald to lower Manhattan;

(4) Appellant Stanchich was seen two booths away from Fitzgerald and McDonnell in the Compass Bar;

(5) Following Fitzgerald's meeting with McDonnell at the Compass Bar, appellant Stanchich, Fitzgerald, and Napoli were seen in discussion at Number Two Broadway; and

(6) Following Fitzgerald's arrest, appellant Stanchich was apprehended while driving his car in the lower Manhattan area.

Together, all these facts establish only that Stanchich associated with and was in the vicinity of Fitzgerald on the day of the arrest and two days earlier. This evidence was woefully inadequate to establish Stanchich's participation in a conspiracy, as the trial court indeed found.

To prove appellant Stanchich's guilt of a conspiracy, the Government had to show that there was a knowing agreement to transfer a counterfeit Treasury note with knowledge that the note was counterfeit. 18 U.S.C. §§472, 473; cf. United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975). At the very least, "[t]here must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or make it succeed." United States v. Cirillo, 499 F.2d 872, 883 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); United States v. Oliva, 497 F.2d 130 (5th Cir. 1974); see United States v. Johnson, 513 F.2d 819, 823 (2d Cir. 1975); United

States v. Amato, 495 F.2d 545, 550 (5th Cir.), cert. denied, 419 U.S. 1013 (1974).

The salient fact here is that there was no evidence that appellant Stanchich was aware that Fitzgerald was dealing in Treasury notes, and none that Stanchich knew that the Treasury notes were counterfeit. For example, there was no proof that Stanchich ever possessed or even saw any of the counterfeit Treasury bills passed in this case, proof which would have made him aware of the nature of the bills. Nor was Stanchich within hearing during any of Fitzgerald's discussions with Lurie and McDonnell, conversations that established Fitzgerald's guilt beyond peradventure of doubt.

Nor, as the Government argued below, is the missing proof of Stanchich's participation with knowledge established by his conversations with Fitzgerald at the Market Diner or at Number Two Broadway, for the simple reason that there is no evidence of what was discussed during those meetings. For all the record discloses, Fitzgerald may have been attempting to induce appellant Stanchich to participate in the conspiracy or to lend him the $25,000 he was having difficulty obtaining from McDonnell. See United States v. Cirillo, supra, 499 F.2d at 884-885. Moreover, the pair may well have been discussing any number of legitimate business transactions.

Further, appellant Stanchich's presence near Fitzgerald in the Compass Bar or his presence in his own automobile in lower Manhattan is not sufficiently probative of Stanchich's knowing participation in a conspiracy. The law is clear that

mere presence, even if enhanced by the knowledge that a crime is being committed, does not establish an agreement to participate. United States v. Johnson, supra, 513 F.2d at 823; United States v. Quintana, 508 F.2d 867, 880 (7th Cir. 1975); United States v. Oliva, supra, 497 F.2d 130. Here, of course, there was no evidence that appellant Stanchich had knowledge that the "deal" involved notes or that the notes were counterfeit. Thus, the non-hearsay evidence here is even weaker than that held insufficient in Oliva. There, Oliva was present during an initial conversation concerning the purchase of cocaine. The seller of the drugs then placed several telephone calls to Oliva's residence on the date of the sale. Later that day, Oliva was observed following the seller into a parking lot where the sale was to take place. There was also testimony that Oliva appeared nervous at the time of the sale and that he left the parking lot at approximately the time of the principal's arrest. Finally, when Oliva was arrested, a pistol was discovered in his possession. Finding that this evidence showed only Oliva's knowing presence, the Fifth Circuit reversed, since

> [t]here was no showing that [Oliva] and [the principal] ever discussed the sale of cocaine to the government agents, that [Oliva] ever agreed to supply [the principal] with cocaine, or that [Oliva] ever actually furnished [the principal] with cocaine. No cocaine was ever shown to be in [Oliva's] possession.
>
> Id., 497 F.2d at 134.

Here, there was even less, for unlike Oliva, there was no evidence that appellant Stanchich was even aware that Fitzgerald was dealing in bills. And even if Stanchich could be said to have been aware that Fitzgerald was dealing in bills, there is not one scintilla of proof that he was aware the notes were counterfeit. Cf. United States v. DiRe, 332 U.S. 581, 593 (1948) (presence during transaction involving counterfeit ration coupons does not even establish probable cause where no evidence defendant knew coupons were counterfeit).

Accordingly, the court was correct in concluding that the evidence was insufficient to establish appellant Stanchich's participation in a conspiracy.[10] That being the case, the hearsay evidence should not have been admitted for any purpose on any of the counts.

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[10]The court was also correct in its determination that appellant Stanchich's activities outside the Cattleman Restaurant did not establish his knowing participation, since he may well have been present and followed behind McDonnell at Fitzgerald's insistence, without any idea of the underlying purpose of the activity. See United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1974); see infra at 26.

Point II

WITH OR WITHOUT THE HEARSAY EVIDENCE, THERE WAS INSUFFICIENT PROOF TO ESTABLISH APPELLANT STANCHICH'S GUILT OF AIDING AND ABETTING.

As noted in Point I, the non-hearsay evidence failed to establish appellant Stanchich's participation with knowledge in a conspiracy. In fact, the court dismissed the conspiracy count against both appellant Stanchich and Fitzgerald. A similar analysis applies to the substantive convictions on transferring the counterfeit Treasury note. Accordingly, the court erred in denying appellant Stanchich's motion to dismiss Counts Two and Three.

The record is devoid of evidence to show that appellant Stanchich ever possessed or transported the Treasury note involved in this case. The only theory of guilt, and the one on which the Government relied, is that appellant aided and abetted the transfer. As in a conspiracy, proof of aiding and abetting requires proof that the defendant "consciously assisted the commission of the specific crime in some active way." United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975); Nye and Nissen v. United States, 336 U.S. 613, 619 (1949).

Proof of knowing participation by appellant Stanchich is absent here, as it was on the conspiracy charge, for there is no evidence that Stanchich participated or contributed to

Fitzgerald's scheme with knowledge of its criminality. Appellant Stanchich never possessed the bills, he never saw them, he never participated in the negotiations, and was never even within hearing when the negotiations between Fitzgerald and McDonnell occurred. All that is here, as is true in the conspiracy count, is appellant Stanchich's presence near McDonnell at the Cattleman Restaurant, the Compass Bar, and in lower Manhattan, and his unelucidated conversations with him.

Mere presence and prior association, even presence with knowledge of criminality, absent here, will not satisfy the requirements of aiding and abetting. United States v. Johnson, 513 F.2d 319 (2d Cir. 1975); United States v. Irons, 475 F.2d 40 (8th Cir.), cert. denied, 412 U.S. 951 (1973); Bailey v. United States, 416 F.2d 1110 (D.C. Cir. 1969); see United States v. Infanti, 474 F.2d 522 (2d Cir. 1973).

A comparison between Infanti and the present case is instructive: There, Kurtz, an attorney, and Infanti purchased tickets and travelled to Germany to negotiate the transfer of what were shown to be stolen stock certificates for 40% of their market value. Kurtz was present during the attempted negotiation of the stock. During those negotiations, the individuals who were to buy the certificates attempted to write down the certificate numbers. At that point, Infanti retrieved the certificates and refused to allow the buyers to continue writing. Following the meeting, which did not result in a sale, Kurtz and Infanti went to London and then flew to New

York, where they were arrested upon arrival. At that time Kurtz also uttered a false exculpatory statement.

Despite Kurtz's presence during the negotiations that "would have been obvious to Kurtz, a lawyer, ... were less than legitimate," despite his quick detour to London and his false exculpatory statement, this Court found the evidence insufficient to establish a jury question of Kurtz's guilt. United States v. Infanti, supra, 474 F.2d at 526-527.

Here, there is far less evidence than in Infanti. Appellant Stanchich, although nearby, was never present during negotiations, nor, unlike Kurtz, did he ever see the certificates. While it may be argued that appellant Stanchich's alleged surveillance of McDonnell at the Cattleman Restaurant is some evidence that appellant might have known that McDonnell's deal, whatever it was, was "less than legitimate," it furnished far less a basis for inferring knowledge than did Kurtz's presence when Infanti withdrew the stock certificates. Like Kurtz's trip to London, appellant Stanchich's presence at the Cattleman Restaurant could well have been at the insistence of the guilty principal, without disclosure of the purpose of the activity. Finally, unlike Kurtz, Stanchich never gave a false exculpatory story which could be used to infer his knowledge.

In fact, even with the aid of Fitzgerald's hearsay statements, the evidence here is insufficient to establish appellant Stanchich's guilt of aiding and abetting. Fitzgerald's frequent

hearsay references to "his people" indeed establish that Fitzgerald may not have acted alone. However, it does not establish Stanchich's guilt, since there is no evidence that appellant was one of Fitzgerald's "people." See United States v. Infanti, supra, 474 F.2d at 527 (reference to Telex message by alleged conspirator that his "clients" would be present in Frankfurt). In fact, appellant Stanchich was expressly excluded from that category by Fitzgerald. Thus, in his conversation with Lurie on November 3, 1975, Fitzgerald told Lurie that he had not spoken to Stanchich but that he had contacted "his people" and that they would have a sample available (49-50).

Moreover, Fitzgerald's hearsay statement at the Blarney Stone Bar that he would "get rid of" Stanchich cannot prove appellant's association with Fitzgerald with knowledge of Fitzgerald's illegal activity. In fact, Fitzgerald's persistent efforts to keep Stanchich away from the transactions indicates that Fitzgerald apparently wished that his acquaintance be kept ignorant of the criminal behavior. This statement reinforces the probability that appellant Stanchich's association with Fitzgerald was for a legal business matter unconnected with Fitzgerald's criminal behavior, which in fact could be jeopardized if appellant Stanchich had found out about Fitzgerald's activities.

Finally, the so-called prior similar act adds nothing to the proof of appellant Stanchich's guilt (cf. United States v. Johnson, supra, 513 F.2d 319), for the simple reason that

there was no proof that appellant Stanchich dealt with the bills or was aware that Fitzgerald was dealing in bills. Appellant Stanchich's prior act could only have supported an inference that he knew the bills were counterfeit if coupled with proof that he was aware of and participated in a transaction involving Treasury bills. Absent such evidence, the prior similar act was simply irrelevant.

In sum, either with or without the inadmissible hearsay, the record fails to show appellant Stanchich's participation with knowledge in Fitzgerald's illegal venture. Accordingly, the judgment of conviction must be reversed and the case remanded with instructions to enter a judgment of acquittal with respect to appellant Stanchich.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded with instructions to enter a judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

October 26, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Paul L. Goldfel